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Atorneys for Defendants  
Resurgence Financial, LLC,  
Huan Tien Nguyen and Nick Zagorski

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

JILLIAN MCINTYRE, ) CASE NO.: C 07 05565 JCS

Plaintiff, } **ANSWER OF DEFENDANTS TO  
COMPLAINT**

vs.

RESURGENCE FINANCIAL, LLC,  
a corporation, HUAN TIEN  
NGUYEN and NICK ZAGORSKI,

### Defendants.

CASE NO.: C 07 05565 JCS

## **ANSWER OF DEFENDANTS TO COMPLAINT**

Defendants RESURGENCE FINANCIAL, LLC (“Resurgence”), HUAN TIEN NGUYEN (“Nguyen”) and NICK ZAGORSKI (“Zagorski”) (collectively, “Defendants”) hereby submit the following Answer to the Complaint filed in this action by plaintiff JILLIAN MCINTYRE (“Plaintiff”):

1. In answering Paragraph 1 of the Complaint, Defendants aver that the contents of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* and the Rosenthal Fair Debt Collection Practices Act, California Civil Code § 1788 *et seq.* are self-explanatory. Except as herein admitted, the remaining allegations of Paragraph 1 are denied.

10        2. In answering Paragraph 2 of the Complaint, Defendants admit that  
11 Plaintiff alleges that jurisdiction of this Court arises under 15 U.S.C § 1692k(d)  
12 and 28 U.S.C. § 1337; that supplemental jurisdiction exists for Plaintiff's state law  
13 claims pursuant to 28 U.S.C. § 1337; and that declaratory relief is available  
14 pursuant to 28 U.S.C. §§ 2201 and 2202. Defendants further admit that Defendant  
15 Resurgence Financial has conducted interstate business with residents of this  
16 judicial district. Except as herein admitted, the remaining allegations of Paragraph  
17 2 are denied.

18       3. Defendants admit, on information and belief, the allegations of  
19 Paragraph 3 of the Complaint.

20       4. In answering Paragraph 4 of the Complaint, Defendants admit that  
21 defendant Resurgence is an Illinois limited liability company with its principal  
22 place of business located at 4100 Commercial Avenue, Northbrook, IL 60062 and  
23 that Resurgence has at times conducted interstate business with residents of the  
24 state of California. Defendants further admit that Resurgence has, at times, acted  
25 as a “debt collector” as defined by 15 U.S.C. § 1692a(6) and California Civil Code  
26 § 1788.2(c). Except as herein admitted, the remaining allegations of Paragraph 4  
27 are denied.

1       5. In answering Paragraph 5 of the Complaint, Defendants admit that  
2 defendant Nguyen is an attorney that was formerly employed by Resurgence in  
3 Costa Mesa, California. Except as herein admitted, the remaining allegations of  
4 Paragraph 5 are denied.

5       6. In answering Paragraph 6 of the Complaint, Defendants admit that  
6 defendant Zagorski was formerly employed by Resurgence in Costa Mesa,  
7 California. Except as herein admitted, the remaining allegations of Paragraph 6  
8 are denied.

9       7. Denied.

10      8. In answering Paragraph 8 of the Complaint, Defendants lack  
11 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation  
12 at issue was incurred primarily for personal, family or household purposes, and  
13 therefore can neither admit nor deny whether Plaintiff qualifies as a "consumer" as  
14 defined by 15 U.S.C. § 1692a(3) and on that basis, deny the allegation. Except as  
15 herein admitted, the remaining allegations of Paragraph 8 are denied.

16      9. In answering Paragraph 9 of the Complaint, Defendants lack  
17 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation  
18 at issue was incurred primarily for personal, family or household purposes, and  
19 therefore can neither admit nor deny whether Plaintiff's financial obligation at  
20 issue qualifies as a "debt" as defined by 15 U.S.C. § 1692a(5) and on that basis,  
21 deny the allegation. Except as herein admitted, the remaining allegations of  
22 Paragraph 9 are denied.

23      10. In answering Paragraph 10 of the Complaint, Defendants lack  
24 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation  
25 at issue was incurred primarily for personal, family or household purposes, and  
26 therefore can neither admit nor deny whether Plaintiff qualifies as a "debtor" as  
27 defined by California Civil Code § 1788.2(h) and on that basis, deny the

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1 allegation. Except as herein admitted, the remaining allegations of Paragraph 10  
2 are denied.

3       11. In answering Paragraph 11 of the Complaint, Defendants lack  
4 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation  
5 at issue was incurred primarily for personal, family or household purposes, and  
6 therefore can neither admit nor deny whether Plaintiff's financial obligation at  
7 issue qualifies as a "consumer debt" as defined by California Civil Code §  
8 1788.2(f) and on that basis, deny the allegation. Except as herein admitted, the  
9 remaining allegations of Paragraph 11 are denied.

10      12. Denied.

11      13. Defendants aver that no response to Paragraph 13 of the Complaint is  
12 required of them.

13      14. In answering Paragraph 14 of the Complaint, Defendants aver that the  
14 contents of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* are  
15 self-explanatory. Except as herein admitted, the remaining allegations of  
16 Paragraph 14 are denied.

17      15. Defendants aver that no response to Paragraph 15 of the Complaint is  
18 required of them.

19      16. In answering Paragraph 16 of the Complaint, Defendants admit that  
20 Resurgence has, at times, purchased portfolios of charged-off debt for less than the  
21 face value of the original debt. Except as herein admitted, the remaining  
22 allegations of Paragraph 16 are denied.

23      17. In answering Paragraph 17 of the Complaint, Defendants admit that  
24 Resurgence has, at times, retained counsel to file lawsuits to recover the debt that  
25 it has purchased directly or indirectly from the original creditor. Except as herein  
26 admitted, the remaining allegations of Paragraph 17 are denied.

27      18. Denied.

1           19. Denied.

2           20. Denied.

3           21. Denied.

4           22. Denied.

5           23. Denied.

6           24. Denied.

7           25. Denied.

8           26. In answering Paragraph 26 of the Complaint, Defendants admit that  
9 Resurgence sued Plaintiff to collect on a financial obligation that was owed to it  
10 by Plaintiff. Except as herein admitted, the remaining allegations of Paragraph 26  
11 are denied.

12          27. Denied.

13          28. Denied.

14          29. Denied.

15          30. In answering Paragraph 30 of the Complaint, Defendants admit that  
16 Resurgence sought to collect on a financial obligation, originally incurred by  
17 Plaintiff on a credit card issued by Citibank Universal Card Services, and that the  
18 debt was owed by Plaintiff. Defendants lack sufficient knowledge to form a belief  
19 as to the remaining allegations of Paragraph 30 of the Complaint and on that basis,  
20 deny them.

21          31. In answering Paragraph 31 of the Complaint, Defendants admit that  
22 Resurgence engaged attorneys to file a collection action against Plaintiff, which  
23 action was commenced on November 3, 2006 in the Superior Court of California,  
24 County of San Mateo under case number CLJ 458756 (the “Underlying Action”).  
25 Except as herein admitted, the remaining allegations of Paragraph 31 are denied.

26          32. Denied.

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1       33. In answering Paragraph 33 of the Complaint, Defendants admit that  
2 the complaint in the Underlying Action was properly served upon Plaintiff on or  
3 about November 4, 2006. Except as herein admitted, the remaining allegations of  
4 Paragraph 33 are denied.

5       34. Denied.

6       35. In answering Paragraph 35 of the Complaint, Defendants lack  
7 sufficient knowledge to form a belief as to whether "Plaintiff was completely  
8 distracted and consumed with researching the statute of limitations and wage  
9 garnishment laws in California" and on that basis, deny the allegation. Defendants  
10 deny the remaining allegations of Paragraph 35 of the Complaint.

11       36. In answering Paragraph 36 of the Complaint, Defendants lack  
12 sufficient knowledge to form a belief as to whether "Plaintiff was unable to  
13 concentrate at work and was too depressed to engage in the normal daily functions  
14 she normally engages in" and on that basis, deny the allegation. Defendants deny  
15 the remaining allegations of Paragraph 36 of the Complaint.

16       37. In answering Paragraph 37 of the Complaint, Defendants admit that  
17 on or about November 6, 2006, Plaintiff phoned Resurgence and spoke with  
18 Zagorski. Defendants lack sufficient knowledge to form a belief as to the  
19 remaining allegations of Paragraph 37 of the Complaint and on that basis, deny  
20 them.

21       38. Defendants deny, on information and belief, the allegations of  
22 Paragraph 38 of the Complaint.

23       39. Defendants deny, on information and belief, the allegations of  
24 Paragraph 39 of the Complaint.

25       40. Defendants deny, on information and belief, the allegations of  
26 Paragraph 40 of the Complaint.

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1       41. Defendants deny, on information and belief, the allegations of  
2 Paragraph 41 of the Complaint.

3       42. Denied.

4       43. Denied.

5       44. Defendants lack sufficient information for form a belief as to the  
6 allegations of Paragraph 44 of the Complaint and on that basis, deny them.

7       45. Defendants lack sufficient information for form a belief as to the  
8 allegations of Paragraph 45 of the Complaint and on that basis, deny them.

9       46. Defendants lack sufficient information for form a belief as to the  
10 allegations of Paragraph 46 of the Complaint and on that basis, deny them.

11       47. Defendants lack sufficient information for form a belief as to the  
12 allegations of Paragraph 47 of the Complaint and on that basis, deny them.

13       48. Defendants lack sufficient information for form a belief as to the  
14 allegations of Paragraph 48 of the Complaint and on that basis, deny them.

15       49. Denied.

16       50. Denied.

17       51. Admitted.

18       52. In answering Paragraph 52 of the Complaint, Defendants admit that  
19 on or about December 20, 2006, Resurgence served “Plaintiff’s Response to  
20 Defendant’s Demand for Bill of Particulars” in the Underlying Action. Except as  
21 herein admitted, the remaining allegations of Paragraph 52 are denied.

22       53. Denied.

23       54. Denied.

24       55. Denied.

25       56. Denied.

26       57. In answering Paragraph 57 of the Complaint, Defendants admit that  
27 on or about January 22, 2007, Resurgence dismissed its complaint in the

1 Underlying Action. Except as herein admitted, the remaining allegations of  
2 Paragraph 57 are denied.

3 58. Denied.

4 59. Defendants deny, on information and belief, the allegations of  
5 Paragraph 59 of the Complaint.

6 60. Denied.

7 61. Denied.

8 62. Denied.

9 63. Denied.

10 64. Denied.

11 65. Denied.

12 66. Defendants incorporate by reference paragraphs 1 through 66 above,  
13 as if fully stated herein.

14 67. Denied.

15 68. Denied.

16 69. Defendants incorporate by reference paragraphs 1 through 69 above,  
17 as if fully stated herein.

18 70. Denied.

19 71. Denied.

20 72. Defendants incorporate by reference paragraphs 1 through 71 above,  
21 as if fully stated herein.

22 73. Denied.

23 74. Denied.

24 75. Denied.

25 76. Denied.

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1                   **AFFIRMATIVE DEFENSES**

2                   As and for separate affirmative defenses to the Complaint, Defendants  
3                   allege as follows:

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5                   **FIRST AFFIRMATIVE DEFENSE**

6                   **(Failure to State a Claim)**

7                   The allegations of the Complaint fail to state a claim against Defendants  
8                   upon which relief can be granted.

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10                  **SECOND AFFIRMATIVE DEFENSE**

11                  **(Statute of Limitations/Laches)**

12                  The purported claims set forth in the Complaint are barred in whole or in  
13                  part by the applicable statutes of limitation and/or the equitable doctrine of laches.

14

15                  **THIRD AFFIRMATIVE DEFENSE**

16                  **(Bona Fide Error)**

17                  To the extent that any violation of law occurred, which Defendants  
18                  expressly deny, said violation was not intentional and resulted from a bona fide  
19                  error notwithstanding the maintenance by Defendants of procedures reasonably  
20                  adapted to avoid any such error.

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22                  **FOURTH AFFIRMATIVE DEFENSE**

23                  **(Unclean Hands)**

24                  The allegations in the Complaint and relief requested are on information and  
25                  belief barred in whole or in part by the doctrine of unclean hands.

## **FIFTH AFFIRMATIVE DEFENSE (No Wilful Conduct)**

Defendants acted in good faith at all times in their dealings with Plaintiff, and if any conduct by Defendants is found to be unlawful, which Defendants expressly deny, such conduct was not willful and should not give rise to liability.

## **SIXTH AFFIRMATIVE DEFENSE**

### **(Failure to Mitigate)**

Plaintiff, although under a legal obligation to do so, has failed to take reasonable steps to mitigate any alleged damages that she may have and is therefore barred from recovering damages, if any, from Defendants.

## **SEVENTH AFFIRMATIVE DEFENSE (Waiver)**

Plaintiff has waived her rights, if any, to recover the relief she seeks in the Complaint based upon her own conduct and admissions with respect to the debt.

## **EIGHTH AFFIRMATIVE DEFENSE**

### **(Good Faith)**

Defendants have, at all material times with respect to Plaintiff, acted in good faith in an effort to comply fully with all relevant federal and state laws.

# NINTH AFFIRMATIVE DEFENSE

## (Apportionment)

Without admitting that any damages exist, if damages were suffered by Plaintiff as alleged in the Complaint, those damages were proximately caused by and contributed by persons other than Defendants. The liability, if any exists, of

1 all Defendants and/or any responsible parties, named or unnamed, should be  
2 apportioned according to their relative degrees of fault, and the liability of these  
3 Defendants should be reduced accordingly.

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5 **TENTH AFFIRMATIVE DEFENSE**  
6 **(Supervening Cause)**

7 The causes of action in the Complaint are barred, in whole or in part, to the extent  
8 that any injury or loss sustained was caused by intervening or supervening events over which Defendants had or have no control.

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10 **ELEVENTH AFFIRMATIVE DEFENSE**  
11 **(Equitable Indemnity)**

12 To the extent that Plaintiff has suffered any damage as a result of any alleged act or omission of Defendants, which Defendants deny, Defendants are entitled to equitable indemnity according to comparative fault from other persons and/or entities causing or contributing to such damages, if any.

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14 **TWELFTH AFFIRMATIVE DEFENSE**  
15 **(Setoff)**

16 To the extent that Plaintiff has suffered any damage as a result of any alleged act or omission of Defendants, which Defendants deny, Defendants are, on information and belief, entitled to a setoff in the amount Plaintiff owes to Resurgence on her unpaid account, including any recoverable interest and attorneys' fees.

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# **THIRTEENTH AFFIRMATIVE DEFENSE**

## **(Litigation Privilege)**

The actions of Defendants complained of in the Complaint constitute communications that were made in good faith and in anticipation of or in connection with ongoing litigation and Plaintiff's state law claims are therefore barred, in whole or in part, by the litigation privilege.

## **FOURTEENTH AFFIRMATIVE DEFENSE (First Amendment)**

Defendants' conduct is protected under the First Amendment of the United States Constitution and the California Constitution. Plaintiff's proposed interpretation of provisions of the FDCPA and the Rosenthal Act must be rejected as they would place an unreasonable restraint upon Defendants' First Amendment rights, thereby raising serious constitutional issues.

WHEREFORE, Defendants request judgment as follows:

1. That Plaintiff takes nothing by the Complaint, which should be dismissed with prejudice.
  2. That Defendants recover from Plaintiff their costs according to proof.
  3. That Defendants recover their attorneys' fees according to proof.
  4. That the Court orders such other further reasonable relief as the Court may deem just and proper.

DATED: December 3, 2007

SIMMONDS & NARITA LLP

By: s/Tomio Narita

Tomio B. Narita

## Attorneys for Defendants